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PP v. SUAHAILI HASSAN & ANOR

HIGH COURT SABAH & SARAWAK, TAWAU
ALWI ABDUL WAHAB JC
[CASE NO: TWU-45SO-16-8-2017]
22 FEBRUARY 2018

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CRIMINAL LAW: *Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 – Section 26A – Offence of smuggling illegal immigrants – Accused persons pleaded guilty – Sentencing – Mitigating factors – Whether court must consider geographical boundaries – Trend of sentencing – Whether six years' imprisonment reasonable and appropriate*

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CRIMINAL PROCEDURE: *Sentencing – Offences – Offence of smuggling illegal immigrants – Accused persons pleaded guilty – Mitigating factors – Whether court must consider geographical boundaries – Trend of sentencing – Whether six years' imprisonment reasonable and appropriate – Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26A*

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The first and second accused were charged under s. 26A of the Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 ('ATIPSOM') for smuggling in six illegal immigrants. Before the trial, the first and second accused indicated to the court that they wished to change their plea of not guilty to guilty. The charge was then read and explained to both accused persons in Bahasa Malaysia and they pleaded guilty to the charges accordingly. The Deputy Public Prosecutor ('the DPP') submitted that the imprisonment sentence to be imposed should be ten years following the case of *PP v. Nawi & Ali* ('*Nawi*'s case') due to the seriousness of the offence committed by the first and second accused which involved national security and the sovereignty of this country. The first and second accused, on the other hand, cited the case of *PP v. Marwan Sirait* where the accused was sentenced to six years' imprisonment after he pleaded guilty to an offence under s. 26 of the ATIPSOM. The first and second accused further submitted that *Nawi*'s case must be distinguished with the present case for the apparent reason that it took place in Semenanjung Malaysia whereby this case had happened in Tawau, Sabah. This court was urged to take into consideration the geographical boundaries of the State of Sabah particularly the District of Tawau pursuant to s. 57(1)(j) of the Evidence Act 1950 as an important factor to be considered before sentence was imposed on the first and second accused. The first and second accused also claimed that there was no element of profit-making that benefited both the first and second accused in the present case.

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Held (accepting both accused persons' pleas of guilty and convicting them accordingly):

(1) In passing sentence for the first and second accused, this court must consider the geographical boundaries of the territorial State of Sabah particularly the District of Tawau. Its coastal areas are wide and long as well as close to the neighbouring countries namely Indonesia and Philippines which makes such cross-border migration become so easy through 'jalan tikus.' (para 14)

(2) Looking at the trend of sentencing in the past, for such an offence of smuggling under s. 26A of the ATIPSOM, the sentence meted out in 2016 and 2017 was between four to five years of imprisonment and in a recent case of similar nature, this court sentenced the accused to six years of imprisonment. The imprisonment sentence of between six to ten years was appropriate due to the frequency of such offence. (para 15)

(3) The first and second accused's pleas of guilty had in a way sped up the disposal of the case and saved a lot of time. In the circumstances of the case and having considered the mitigation by the first and second accused, the six years' imprisonment was reasonable and appropriate. (para 17)

Case(s) referred to:
Hardi Banggulung v. PP (J-05(H)-21-01-2017 (IDN)) (Unreported) ***(refd)***
Mohd Tahir Bahtiar & Satu Lagi lwn. PP [2018] 1 LNS 307 CA ***(refd)***
Nurul Islam lwn. PP [2016] 1 LNS 1381 HC ***(refd)***
PP v. Abdullah Wajid & Mr Wichai (K-05(H)-301-08-2016) (Unreported) ***(refd)***
PP lwn. Marwan Sirait [2017] 1 LNS 649 HC ***(refd)***
PP v. Nawi & Ali (Criminal Appeal No: B-05(H)-118-03-2017 (IDN) (Unreported) ***(dist)***

Legislation referred to:
Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007, s. 26A
Evidence Act 1950, s. 57(1)(j)

For the prosecution - Khairunnizam Mohd Ideris; DPP
For the accused - Kamarudin Mohmad Chinki & Ram Singh; M/s Chang & Kamarudin

Reported by Suhainah Wahiduddin

JUDGMENT

Alwi Abdul Wahab JC:

[1] The first and second accused in the present case were charged under s. 26A of Anti-Trafficking in Persons and Anti-Smuggling of Migrants Act 2007 (ATIPSOM) (Act 670) as follows:

A Bahawa kamu bersama-sama pada 1hb. Mac, 2017 jam lebih kurang 3.00 pagi bertempat di Jalan Felda Sahabat 55 dalam daerah Lahad Datu dalam negeri Sabah, dalam melanjutkan niat bersama kamu telah didapati teribat dalam aktiviti penyeludupan Migran, iaitu melibatkan 6 imigran yang diseludup menggunakan kenderaan jenis Isuzu Dimax warna putih no. pendaftaran SD2187H bernama seperti mana Lampiran A. Oleh yang
B demikian kamu telah melakukan satu kesalahan di bawah seksyen 26A ATIPSOM 2007 yang boleh dihukum di bawah Akta yang sama dan dibaca bersama dengan seksyen 34 Kanun Kesiksaan.

[2] The case was fixed for trial on 15 January 2018. Before the trial takes off, learned counsel for the first and second accused had indicated to the court
C that his clients wished to change their plea of not guilty to a plea of guilty. The charge was then read and explained to both accused in Bahasa Malaysia and they pleaded guilty to the charge accordingly.

[3] The facts of the case and the exhibits were tendered and marked by the court. The court also heard the mitigation from learned counsel on behalf
D of the first and second accused. Before the sentence was passed against the first and second accused, it was brought to my attention by the learned DPP that the sentence to be passed should not be less than ten years based on the Court of Appeal's case of *PP v. Nawi & Ali* (Criminal Appeal No: B-05(H)-118-03-2017 (IDN)) handed down on 11 December 2017.

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[4] In *Nawi & Ali*'s case *(supra)*, the Court of Appeal had increased the sentence of six years imposed by the High Court for the offence under s. 26A of ATIPSOM to ten years' imprisonment. In light of the said Court of Appeal's case, this court deferred the sentence to be meted out against both the first and second accused to allow for both parties to submit on the issue
F whether this court ought to follow the decision of the Court of Appeal in enhancing the sentence to ten years' imprisonment.

[5] The learned DPP submitted that the imprisonment sentence to be imposed by this court should be ten years following *Nawi & Ali*'s case *(supra)*. This is due to the seriousness of the offence committed by the first and second
G accused which involved national security and the sovereignty of this country. He further submitted that any imprisonment term of less than ten years would be "manifestly inadequate". He then listed out few other cases decided by the Court of Appeal namely:

H (i) *Mohd Tahir Bahtiar & Satu Lagi lwn. PP* [2018] 1 LNS 307;

(ii) *Hardi Banggulung v. Pendakwaraya* (J-05(H)-21-01-2017 (IDN));

(iii) *Pendakwaraya v. Abdullah bin Wajid & Mr. Wichai* (K-05(H)-301-08-2016); and

I (iv) *Nurul Islam lwn. PP* [2016] 1 LNS 1381; [2016] 12 MLJ 433.

[6] In *Mohd Tahir (supra)* and *Hardi Banggulung*'s *cases (supra)* the Court of Appeal affirmed the ten years' imprisonment imposed by the High Court which was given on 23 November 2017. In *Pendakwaraya v. Abdullah bin Wajid & Mr. Wichai (supra)*, the Court of Appeal enhanced the sentence from four years to eight years' imprisonment for the same offence under s. 26A of the ATIPSOM which decision was given on 5 December 2016. In *Nurul Islam v. PP (supra)*, the Court of Appeal affirmed the ten years' imprisonment imposed by the High Court for the same offence under s. 26A of the ATIPSOM.

[7] Learned counsel for the first and second accused, on the other hand, cited the case of *PP lwn. Marwan Sirait* [2017] 1 LNS 649 where the accused was sentenced to six years' imprisonment after he pleaded guilty to an offence under s. 26A of the ATIPSOM. Learned counsel for the first and second accused further submitted that the Court of Appeal's case of *Nawi & Ali (supra)* must be distinguished with the present case for the apparent reason that *Nawi & Ali*'s case *(supra)* and the other three cases cited by the learned DPP took place in Semenanjung Malaysia whereby this case happened in Tawau, Sabah. He urged the court to take into consideration the geographical boundaries of the State of Sabah particularly the District of Tawau pursuant to s. 57(1)(j) of the Evidence Act 1950 as an important factor to be considered before sentence is imposed on the first and second accused.

[8] Learned counsel also distinguished the present case with the case of *Marwan Sirait (supra)* cited by them and also *Nurul Islam (supra)* cited by learned DPP. In *Nurul Islam (supra)*, the accused was charged with three charges for the offence under s. 26A of the ATIPSOM and the case involved the operation of a syndicate which smuggling in a large number of illegal immigrants whereas in *Marwan Sirait*'s case *(supra)* as well as in the present case, the accused operated individually and in duo, a rather less extensive than the syndicate operations.

[9] It was also argued by learned counsel for the first and second accused that there were no grounds of judgment given by the Court of Appeal in *Nawi & Ali'*s case *(supra)* as to why the sentence of ten years' imprisonment was meted out.

[10] Besides the difference in the geographical boundaries between Semenanjung Malaysia and Sabah, learned counsel for the first and second accused also raised the point that the six illegal immigrants who were smuggled by the first and second accused heading towards Lahad Datu were actually the relatives and family members of the second accused who had just arrived from the Philippines through what is known as "Jalan Tikus" (unauthorised route) at the shore of Kampung Tulibas Besar.

[11] Learned counsel for the first and second accused also urged this court to consider the role of the first and second accused in the commission of the offence. The first accused was merely a driver and the second accused was the passenger together with the rests of her family members who were transported in the said vehicle.

[12] There was no torturing of the so-called six victims of the illegal immigrants as in the real case of human trafficking and smuggling of migrants because they are the second accused's family members who came in and out of Sabah's shores due to the geographical boundaries. As clearly stated in the facts of the case, the second accused was merely asking the first accused for help to transport her family members who had just arrived from the Philippines. Hence there is no element of profit-making that benefited both the first and second accused in the present case.

[13] It is also clear that the case of *Nawi & Ali (supra), Mohd Tahir (supra), Hardi Banggulung (supra)* and *Nur Islam (supra)*, the offences were all committed in Semenanjung Malaysia and the Court of Appeal having not consistent in giving ten years' imprisonment as can be seen in the case of *Pendakwaraya v. Abdullah Wajid* and *Mr. Wichai (supra)* where the Court of Appeal enhanced the sentence on both accused to eight years' imprisonment after they pleaded guilty in trafficking 18 illegal immigrants from Myanmar.

[14] I am of the view and as rightly pointed out by learned counsel for the first and second accused, in passing sentence, this court must consider the geographical boundaries of the territorial State of Sabah particularly the District of Tawau. Its coastal areas are wide and long as well as close to the neighbouring countries namely Indonesia and Philippines which makes such cross-border migration became so easy through "Jalan Tikus".

[15] Looking at the trend of sentencing by this court in the past for such an offence of smuggling under s. 26A of the ATIPSOM, the sentence meted out by this court in 2016 and 2017 is between four to five years of imprisonment and in a recent case of similar nature, this court sentence the accused to six years of imprisonment. In my view, the imprisonment sentence of between six to ten years is appropriate due to the frequency of such offence being brought to this court.

[16] It must not be denied that the accused's plea of guilty has in a way speed up the disposal of the case and save a lot of time to everyone. In the circumstances of the present case and having considered the mitigation by the first and second accused, I am of the view that six years' imprisonment is reasonable and appropriate.

[17] I therefore accept both accused's pleas of guilty and convict them accordingly. I sentence each of them to six years' imprisonment with effect from the date of arrest.